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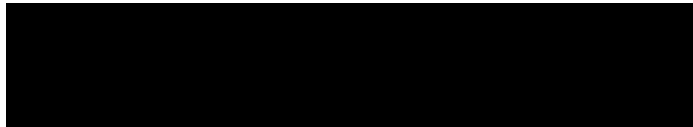
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U.S. Department of Homeland Security

Citizenship and Immigration Services

**B6**

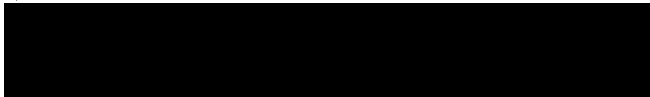
ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



File: EAC 02 090 50374 Office: VERMONT SERVICE CENTER

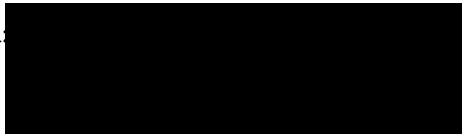
Date: **MAR 02 2004**

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act,  
8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:



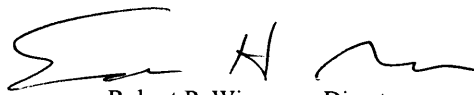
**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are not available.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner demonstrating, with competent evidence, its continuing ability to pay the wage offered beginning on the priority date, the day the Form ETA 750, Request for Labor Certification, was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on November 29, 2000. The proffered wage as stated on the labor certification is \$588.80 per week, which equals \$30,617.60 per year.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on March 11, 2002, the director requested evidence pertinent to the

petitioner's continuing ability to pay the proffered wage. Specifically, the director stated:

Please submit evidence that **your company** has been capable of paying the beneficiary's \$588 weekly salary from November 2000 to present. That evidence must include copies of **your company's** 2000 and 2001 tax returns if filed, and copies of the beneficiary's Form W-2 Wage and Tax Statements from your company for 2000 and 2001. (Emphasis added.)

The request made plain that the director was requesting the tax returns of the petitioning corporation and not the tax returns of the petitioner's owner or owners.

In response, counsel submitted copies of the 2000 and 2001 Form 1040 joint income tax returns of the petitioner's owner and her spouse. Schedule E of those returns states that the petitioner is a subchapter S corporation, as the petitioner's name also indicates. As such, the petitioner would be expected to file its own tax return. Counsel did not provide the petitioner's 2000 and 2001 tax returns, although the director specifically requested them, and did not explain this omission. Further, counsel did not provide the petitioner's 2000 and 2001 W-2 and W-3 forms, although the director had specifically requested them, and did not explain that omission.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

The director's analysis, however, relied at least in part upon the petitioner's owner's personal income in the determination of the petitioner's ability to pay the proffered wage. The evidence indicates that the petitioner is a subchapter S corporation. The petitioner's owner's personal income and assets, therefore, are irrelevant to the ability of the petitioner to pay the proffered wage, as will be discussed further below.

On appeal, counsel provided an accountant's compilation of the petitioner's income statements for 2000, 2001, and the first six months of 2002. Although the accountant's reports do not accompany those statements, the statements themselves make clear that they were produced pursuant to a compilation, not an audit.

8 C.F.R. § 204.5(g)(2) makes clear that only three types of documents are competent evidence of a petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. If the petitioner is a corporation, then the owner's personal income tax return will not suffice.

Compiled financial statements may not be substituted for audited financial statements. Had the accountant's compilation report been presented with those compiled financial statements, as it should have been, it would have declared clearly that the financial statements are a compilation of the representations of management, that they were not produced pursuant to an audit, and that the accountant provided no assurance that the figures were accurate. The representations of management are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

The petitioner failed to submit any competent evidence of its ability to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered salary beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.